IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 21, 2009

STATE OF TENNESSEE v. ZEBEDIAH GEORGE BAGGETT

Appeal from the Circuit Court for Montgomery County
Nos. 40400257, 40400382, 40400560, 40400753, 40701287 Michael R. Jones, Judge

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No. M2008-02842-CCA-R3-CD - Filed December 10, 2009

Appellant, Zebediah George Baggett, was sentenced by the Montgomery County Circuit Court to eleven months and twenty-nine days in incarceration followed by four years of probation following his guilty pleas for theft over $1,000, theft over $10,000, conspiracy to commit aggravated robbery, and aggravated burglary. Subsequently, a violation of probation warrant was issued against Appellant for failure to report new arrests. After a hearing, the trial court dismissed the warrant because the State failed to prove the grounds for the revocation. A second warrant was filed after Appellant was convicted of new offenses. At the second hearing, the trial court revoked Appellant's probation, ordering him to serve his sentence in its entirety. Appellant appeals this revocation of his probation. After a review of the record, we determine that the second probation revocation hearing was not barred by res judicata, as argued by Appellant and that the trial court properly revoked Appellant's probation.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Travis N. Meeks, Clarksville, Tennessee, for the appellant, Zebediah George Baggett.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; John Carney , District Attorney General, and Steve Garrett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On May 6, 2005, Appellant pled guilty to several charges. In case number 40400382, Appellant pled guilty to theft of property over $1,000. As a result, he was sentenced to a four-year split sentence with eleven months and twenty-nine days to serve. The remainder of the sentence was ordered served on probation. The sentence was also ordered to be served consecutively to the sentence in case number 40400257.[1]

In case number 40400560, Appellant pled guilty to conspiracy to commit aggravated robbery. As a result, he was sentenced to a five-year split sentence with eleven months and twenty-nine days to serve and four years on probation. The second count of the indictment was dismissed in settlement. The sentence in case number 40400560 was ordered to be served concurrently to the sentence for theft of property over $1,000 but consecutively to the sentence in case number 40400257.

In case number 40400753, Appellant pled guilty to aggravated burglary and theft of property over $10,000. For each conviction, Appellant received a five-year split sentence in exchange for the guilty plea, with eleven months and twenty-nine days to serve in incarceration with the balance of the sentence to be served on probation. The sentence for aggravated burglary was ordered to be served concurrently to the sentences for theft over $1,000 and conspiracy to commit aggravated robbery but consecutively to the sentence in case number 40400257.

Subsequently, on November 13, 2007, a violation of probation warrant was issued against Appellant for committing the offense of burglary on October 26, 2007; committing aggravated burglary on November 2, 2007; failing to report his new arrest; failing to seek employment; and failing to pay fees, costs, and restitution.

The trial court held a hearing on the violation of probation on March 5, 2008. At the hearing, the State informed the trial court that they would "be proceeding on the failure to report arrest" and "also failure to pay." Appellant's probation officer, Angelia Strickland, testified that she was appointed as Appellant's probation officer in October of 2007. Prior to her appointment as probation officer, Appellant received a violation of probation for "new arrest, technical and a follow-up." The warrant was dismissed, and Appellant was reinstated to probation.

According to Ms. Strickland, Appellant's current violation of probation stemmed from two new arrests for burglary and aggravated burglary, on October 26, 2007, and November 2, 2007, respectively. Ms. Strickland "[m]ade it very clear" that Appellant was to "report" all new arrests.

[1] The judgment in case number 40400257 does not appear in the record on appeal.

Ms. Strickland filed the violation of probation warrant due to Appellant's failure to report the new arrests.

Appellant testified that he was aware of his duty to report new arrests. Appellant claimed that he did not report the new arrests to Ms. Strickland, but reported the new arrests to "her supervisor" by phone. Appellant informed the court that he needed "inpatient rehab" for his drug addictions.

At the conclusion of the hearing, the trial court determined that Appellant "did not violate the terms of his probation. The State did not prove that he committed any new offenses, which were the main allegations, in my mind, in this warrant." As a result, the trial court "dismissed" the warrant.

On July 15, 2008, another violation of probation warrant was issued against Appellant by Ms. Strickland, alleging that Appellant was convicted of aggravated burglary and theft in addition to "Aggravated Burglary x 10, Vandalism x 10, and Theft under $1000." The warrant also alleged that Appellant failed to pay fines, costs, and restitution.

The trial court held a hearing on the warrant on December 1, 2008. At the hearing, counsel for Appellant argued that the new violation of probation warrant was "res judicata, it has already been decided by this Court several months ago when the warrant was dismissed" because "[i]t is the same underlying criminal conviction." The trial court determined that there was a "total difference . . . from committing the offense and having a conviction" and allowed the State to proceed on the warrant.

The trial court took judicial notice of the convictions for aggravated burglary. Ms. Strickland testified that Appellant's case was the first case that she had ever had where she violated someone "for being arrested for the criminal act and then later violated them for pleading guilty to it." Ms. Strickland admitted that Appellant was being violated "twice for the same criminal conduct" but stated that they were "separate" violations of probation because one was for the new arrest and "[t]he other was for a new conviction."

At the conclusion of the hearing, the trial court revoked Appellant's probation, determining that Appellant "entered pleas of guilty" and that "taking judicial notice is sufficient evidence to find him in violation."

Appellant filed a timely notice of appeal. He challenges the trial court's revocation of probation.

Analysis

On appeal, Appellant argues that the trial court improperly ordered the revocation of probation because "Appellant's probation was twice violated for the same criminal offenses; once

for being arrested on new charges and then again for being convicted of those charges." Specifically, Appellant argues that the second warrant was "precluded under the doctrine of Res Judicata." The State, on the other hand, argues that Appellant failed to provide a record that would allow for adequate review of the issues. In the alternative, the State contends that res judicata is not applicable "because the same issue was not litigated in the first and second probation violation hearings."

At the outset, we note that after the filing of the State's brief in which allegations were made as to the inadequacy of the record on appeal, Appellant sought leave to supplement the record with additional information from the trial court. After supplementation from the trial court, the record, while scant, is adequate for appellate review.

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. T.C.A. §§ 40-35-310, -311; *State v. Shaffer*, 45 S.W.3d 553, 554 (Tenn. 2001). After finding a violation of probation and determining that probation should be revoked, a trial judge can: (1) order the defendant to serve the sentence in incarceration; (2) cause execution of the judgment as it was originally entered, or, in other words, begin the probationary sentence anew; or (3) extend the probationary period for up to two years. *See* T.C.A. §§ 40-35-308(c) & -311(e); *State v. Hunter*, 1 S.W.3d 643, 647-48 (Tenn. 1999). The decision to revoke probation rests within the sound discretion of the trial court. *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation or a community corrections sentence is subject to an abuse of discretion standard of review, rather than a de novo standard. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). An abuse of discretion is shown if the record is devoid of substantial evidence to support the conclusion that a violation of probation has occurred. *Id.* The evidence at the revocation hearing need only show that the trial court exercised a conscientious and intelligent judgment in making its decision. *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995).

While we recognize that a new arrest and pending charges are proper grounds on which a trial court can revoke a defendant's probation, a trial court may not rely on the mere fact of an arrest or an indictment to revoke a defendant's probation. *See State v. Harkins*, 811 S.W.2d 79, 83 n.3 (Tenn. 1991). A revocation on this basis requires the State to "produce evidence in the usual form of testimony" in order to establish the probationer's commission of another offense while on probation. *State v. Walter Lee Ellison, Jr.*, No. 01C01-9708-CR-00361, 1998 WL 272955, at *2 (Tenn. Crim. App., at Nashville, May 29, 1998); *see State v. Michael Chaney*, No. 01C01-9801-CC-00010, 1999 WL 97914, at *1 n.2 (Tenn. Crim. App., at Nashville, Feb. 18, 1999).

A trial court has statutory authority to admit trustworthy and probative evidence, including hearsay, for sentencing purposes. T.C .A. § 40-35-209(b); *State v. Chambless*, 682 S.W.2d 227, 233 (Tenn. Crim. App. 1984); *State v. Flynn*, 675 S.W.2d 494, 498 (Tenn. Crim. App. 1984). "Reliable hearsay" is admissible in a probation revocation hearing so long as the opposing party has a fair opportunity to rebut the evidence. T.C.A. § 40-35-209(b). It is generally recognized that in order to prevail in a revocation proceeding based upon allegations of criminal misconduct, the State must

show by a preponderance of the evidence that the defendant violated the law. *See State v. Michael Harlan Byrd*, No. 01C01-9609-CC-00411, 1998 WL 216859, at *7 (Tenn. Crim. App., at Nashville, May 1, 1998). The State need not show a conviction for the new offense, but it should show by a preponderance of the evidence that the defendant violated the law. *See State v. Andrew B. Edwards*, No. W1999-01095-CCA-R3-CD, 2000 WL 705309, at *3 (Tenn. Crim. App., at Jackson, May 26, 2000), *perm. app. dismissed*, (Tenn., Sept. 11, 2000).

In *Massengill v. Scott*, 738 S.W.2d 629 (Tenn. 1987), the Tennessee Supreme Court compared collateral estoppel to the doctrine of res judicata as follows:

> The doctrine of res judicata bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit. Collateral estoppel operates to bar a second suit between the same parties and their privies on a different cause of action only as to issues which were actually litigated and determined in the former suit.

Id. at 631; *see also State v. Thompson*, 285 S.W.3d 840, 847 (Tenn. 2009). The party asserting the claim of res judicata bears the burden of proof. *Gregory v. Gregory*, 803 S.W.2d 242, 243-44 (Tenn. Ct. App. 1990).

> In order to be successful, a party asserting a res judicata defense must demonstrate: (1) that the underlying judgment was rendered by a court of competent jurisdiction; (2) that the same parties were involved in both suits; (3) that the same cause of action was involved in both suits; and (4) that the underlying judgment was on the merits. *Hutcheson v. TVA*, 604 F.Supp. 543, 550 (M.D. Tenn. 1985); 22 Tenn. Juris. *Res Judicata* §§ 8-11 (1985).

Lee v. Hall, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990).

We disagree with Appellant that the doctrine of res judicata bar the revocation of his probation. The issues before the trial court in the separate hearings on the separate warrants were not the "same" for purposes of res judicata. *Lee v. Hall*, 790 S.W.2d at 294. One warrant was filed on the basis of the failure to report new arrests, the second was filed on the basis of new convictions. The issue of the new convictions did not even exist at the time of the first hearing on the initial warrant as Appellant had not yet been convicted of those offenses. Appellant has failed to show that res judicata bars the trial court's revocation of probation. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE